


No. 44848-3-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

JAMES MESSER,

Appellant.

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BRIEF OF APPELLANT

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## ASSIGNMENTS OF ERROR

1. The trial court erred by denying James Messer's motion to suppress evidence after a deputy sheriff patted down and subsequently searched Mr. Messer without lawful authority for doing so.
2. The evidence obtained during the pat down and subsequent search of Mr. Messer should have been excluded as "fruit of the poisonous tree."
3. The trial court erred in entering Findings of Fact 4 and 5 following the hearing on Mr. Messer's motion to suppress evidence.
4. The trial court erred in entering Conclusions of Law 1, 2, 4, 5 and 6 following the hearing on Mr. Messer's motion to suppress evidence.

## ISSUES ARISING FROM ASSIGNMENTS OF ERROR

1. Did a deputy sheriff exceed the scope of his lawful authority when he patted Mr. Messer down and searched him without a warrant?  
(Assignments of Error No. 1, No. 3, and No. 4)
2. Must evidence of the crime of possession with intent to deliver a controlled substance that a deputy sheriff obtained during the pat down and search of Mr. Messer be excluded as "fruit of the poisonous tree?"  
(Assignment of Error No. 2)

## INTRODUCTION

On May 8, 2013, Mason County Superior Court entered a Felony Judgment and Sentence against James Messer (Mr. Messer) for a possession and intent to deliver a controlled substance, methamphetamine, in violation of the Uniform Controlled Substances Act, specifically RCW 69.50.4013. For the reasons set forth below, Mr. Messer submits that the evidence used to convict him followed a sequence of events in which law enforcement officers engaged in conduct that violated the Fourth Amendment of the U. S. Constitution and Article 1, Section 7, of the Washington Constitution.

Consequently, the trial court should have granted his motion to suppress and the evidence used to convict Mr. Messer should have been excluded as “fruit of the poisonous tree.” Through this appeal Mr. Messer seeks to have the dismissal of his motion to suppress and his conviction vacated.

## STATEMENT OF THE CASE

In the early morning of February 6, 2012, toward the end of his duty shift Mason County Deputy Sheriff Matt Gray (Deputy Gray) came upon a car parked in such a way that it blocked a gate that provided access to a radio tower for station KMAS in Shelton, Washington. There were no streetlights in the vicinity. A residential area was several

hundred yards away. Deputy Gray estimated the time to be 3:00 a.m. The car's lights were off and the engine was not running. In the past Deputy Gray had not observed a vehicle parked off to the side of the road in that area. Several years earlier when he joined the Mason County Sheriff's office, other deputies in that office informed him that in the past there had been thefts of wire and copper, and other materials, from the KMAS tower. Consequently, when he came upon the parked car, at approximately 3:00 a.m., Deputy Gray decided to "check[] on why the vehicle was there, was it broke down, was there a crime afoot, a theft in progress." VRP 1: 15-25; 2: 1-25; 3: 1-10; 4: 16-25.

Deputy Gray pulled his vehicle in front of the parked car so that the two vehicles were nose to nose. He then trained his spotlight on the front windshield of the parked car. Upon doing so he noticed two occupants in the vehicle, a male in the driver's seat and a female in the passenger seat. He observed that both occupants of the vehicle were "sleeping pretty hard," such that the spotlight did not awake them. Afterwards Deputy Gray exited his vehicle and approached the driver's side of the parked car. Deputy Gray's "initial instinct" that motivated him to approach the soundly sleeping occupants of the parked car was that they were engaged in or about to engage in criminal behavior. Specifically, his initial instinct "told me theft because that's what I had

been told from recent history with the radio tower.” Missing from Deputy Gray’s explanation of what motivated him to approach the occupants of the parked car was any concern that they might need aid or assistance. VRP 2: 19 -23; 3: 16- 21; 9: 17-24.

Upon arriving at the driver’s side of the parked car, Deputy Gray knocked on the window. Doing so woke and startled the driver. Deputy Gray raised his voice and told the driver to roll down the window. The driver, Mr. Messer, smiled, opened the door slightly, and stated that his window did not roll down. VRP 4: 1-15; 9: 25; 10: 1-4; 14: 5-9; CP 13.

At that point, according to Deputy Gray he saw what he described as a Jim Bowie knife with a fixed blade, approximately five to six inches in length, and a bone handle, in the door panel next to Mr. Messer. Mr. Messer disputes the presence of a “Jim Bowie knife” in the door panel. First, the driver’s side of his vehicle did not have a “door panel.” Second, there was a knife in the vehicle, but the knife was “little deer horn knife” in a shoe box behind the driver’s seat. The contents of the shoe box were not visible to anyone standing outside Mr. Messer’s vehicle. VRP 5: 4-25; 6: 1-4; 19: 1-15.

What became of the “Bowie knife” that Deputy Gray stated that he saw is not clear. He did not indicate that he did anything with the knife. Nor in any proceeding subsequent to Deputy Gray’s encounter

with Mr. Messer on February 6, 2012 was the knife ever produced. Regardless, shortly after Mr. Messer opened the driver's side door, slightly, Deputy Gray had Mr. Messer "step out" of the car, in order to "distance [Mr. Messer] from the knife." According to Mr. Messer and the female passenger Deputy Gray dragged Mr. Messer from the car. Mr. Messer did not resist. Deputy Gray then proceeded to pat down Mr. Messer for weapons, beginning with the "front pocket of his exterior coat . . . ." Upon doing so Deputy Gray "felt a glass pipe which [he] automatically recognized as a methamphetamine pipe used to ingest methamphetamine." Deputy Gray then "put [Mr. Messer] in cuffs to secure him and pulled the pipe out to take, you know, take my evidence, secure my evidence." Again, however, there is no evidence that Deputy Gray "secured" the "Jim Bowie knife." Concluding that there was probable cause to believe that Mr. Messer had committed the crime of "drug paraphernalia," Deputy Gray then continued to pat down Mr. Messer. Doing so produced "large amounts of cash, large amounts of methamphetamine. . . . a digital scale, a bunch of plastic baggies, which were consistent with distribution." VRP 6: 9-25; 7: 1-25; 8: 10-25.

In an Information dated February 24, 2012, the Prosecuting Attorney for Mason County accused Mr. Messer with the crime of Possession with Intent to Deliver a Controlled Substance. CP 9-10.

Subsequently, Mr. Messer moved to suppress the evidence that Deputy Gray had seized during the February 6, 2012, encounter. On July 19, 2012, the trial court held a CrR 3.6 suppression hearing at the end of which it denied Mr. Messer's motion to suppress the evidence. At the suppression hearing the State neither introduced the "Jim Bowie knife" nor offered any record of its having been "secured." Further, counsel for Mr. Messer argued, among other things, that there was no legal basis for Deputy Gray to perform a "*Terry* stop" and subsequent officer safety search in the form of a pat down of Mr. Messer. Counsel for the State argued that Deputy Gray had a lawful basis for such a "stop." VRP 1: 7-12; 20: 1-25; 21: 1.

In addition, counsel for the State asserted:

Whether you analyze this under a community caretaking or even a social contact analysis or whether you're analyzing it under a Terry stop, you get to the same outcome.

VRP 22: 9-11.

I would also note for the record if during a consensual or community caretaking contact a citizen behaves in a manner that causes the officer a legitimate concern for his or her safety that officer is entitled to take immediate protective measures.

VRP 23: 1-5.

On October 29, 2012, the trial court entered Findings of Fact and Conclusions of Law as to Mr. Messer's motion to suppress. Among the set of three undisputed findings of fact, the trial court found:

2. On the night of February 6, 2012 Deputy Gray noticed a vehicle parked off the road on private property in front of the gate of the KMAS radio tower. The vehicles lights were off. Deputy Gray was concerned due to past complaints of theft at the KMAS radio tower.

CP 5.

First and second among the three sets of disputed facts the trial court noted:

4. The defendant opened the door to his vehicle, whereupon Deputy Gray observed a big knife near the Defendant.
5. Upon observing the knife, Deputy Gray pulled the Defendant out of the vehicle and patted the Defendant down for officer safety, starting from the top and working his way down. Deputy Gray felt an unusually large pipe in the Defendant's shirt pocket by plain feel. The pipe was unusually large, in that it had a six-inch tube. Deputy Gray did not move or manipulate the drug pipe or any other contents of the Defendant's pocket.

CP 6.

Among the six conclusions of law the trial court stated:

1. Deputy Gray's contact with the Defendant was not a violation of the U.S. Constitution, nor was it a violation of the Washington State Constitution.
2. Deputy Gray had lawful reasons to approach the Defendant's vehicle. First, Deputy Gray had reason to suspect the vehicle due to past theft complaints at the KMAS radio tower. Second, Deputy Gray had good cause to approach the vehicle to perform his community caretaking function. Deputy Gray had good cause to approach the vehicle and reason to be concerned for the passengers' safety due to the fact that the bright light did not wake up the passengers.
4. Deputy Gray patted the Defendant down for officer safety after observing a large knife within reaching distance of the Defendant.
5. During the course of the lawful officer safety frisk, Deputy Gray detected a pipe that was immediately recognizable by plain feel to Deputy Gray as a drug pipe and used to smoke methamphetamine, a controlled substance.

6. Based on the foregoing findings of facts and conclusion of law the court denies Defendant's motion to suppress.

CP 6-7.

On February 1, 2013, the trial court held a jury trial, at the end of which the jury found Mr. Messer guilty of possession with intent to deliver a controlled substance. On May 8, 2013, the trial court entered a Felony Judgment and Sentence against Mr. Messer. On the same day, Mr. Messer filed a Notice of Appeal to the Court of Appeals in which he indicated that he sought review of the Judgment and Sentence, the CrR 3.6 hearing, and the jury trial. CP 3, \_\_\_\_.

## ARGUMENT

### Standard of Review

When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial when it is enough "to persuade a fair-minded person of the truth of the stated premise." *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999). We review conclusions of law from an order pertaining to the suppression of evidence de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *see also State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

*State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. *Nord v.*

*Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, review denied, 100 Wn.2d 1014 (1983).

*State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

1. At no time during his encounter with Mr. Messer on February 6, 2012 was Deputy Gray performing a community caretaking function.

The evidence that formed the basis for Mr. Messer's conviction and sentencing was obtained without a search warrant. In *State v. Garvin*, *supra*, the Washington Supreme Court explained:

As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. *Duncan*, 146 Wn.2d at 171 (citing *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)). There are "a few jealously and carefully drawn exceptions to the warrant requirement," which include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *Duncan*, 146 Wn.2d at 171-72 (internal quotation marks omitted) (quoting *Williams*, 102 Wn.2d at 736, and citing *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997)). The State bears a heavy burden to show the search falls within one of the "narrowly drawn" exceptions. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002). The State must establish the exception to the warrant requirement by clear and convincing evidence. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

*State v. Garvin*, 166 Wn.2d at 249 – 250.

The "exigent circumstances" to which the Washington Supreme Court referred in *Garvin* as applied to Deputy Gray's encounter with Mr. Messer come within the "community caretaking" rubric. The trial court

identified that exception to the warrant requirement as establishing good cause for Deputy Gray to approach Mr. Messer's vehicle and, significantly, "reason [for Deputy Gray] to be concerned for the passengers' safety due to the fact that the bright light did not wake up the passengers." CP 7: 4-6.

In *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed.2d 706 (1973), the U. S. Supreme Court first articulated the rough contours of the "community caretaking function" in the context of a law enforcement officer's approach of an automobile:

Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

*Id.* at 441. Washington courts have followed the U. S. Supreme Court in recognizing the community caretaking exception to the warrant requirement.

In *State v. Kinzy*, 141 Wn.2d 373, 385, 5 P.3d 668 (2000), the Washington Supreme Court reiterated the U. S. Supreme Court's dictate that the community caretaking function does not involve an investigation of suspected criminal activity: "As noted in *Cady*, the community caretaking function exception is totally divorced from a criminal

investigation.” Deputy Gray’s testimony at the CrR 3.6 hearing makes clear that he approached Mr. Messer’s vehicle, at least in part, because he suspected criminal activity involving possible theft from the KMAS tower site:

Q. Why did you check on the vehicle in the first place?

A. Just because of the time of night and I’ve never seen a vehicle pulled off to the side of the road in that area before. And also, when I lateralled over to this department years ago I was advised by other deputies who were training me that in the past thefts had occurred at the KMAS radio tower, and in fact they were so substantial at one point it actually shut the radio station off the air, there was so much theft of wire and copper and whatnot from the tower. So I was basically checking on why the vehicle was there, was it broke down, was there a crime afoot, a theft in progress.

VRP 2: 24-25; 3: 1-10.

Q. At the - going back to your initial encounter with the vehicle, at that point did you reasonably suspect that the occupant or occupants of the vehicle were engaged in or about to engage in criminal activity/

A. Yes, that’s why I contacted them.

Q. What activity were . . . ?

A. My initial instinct told me theft because that’s what I had been told from recent history with the radio tower.

VRP 9: 17-24.

If one were to conclude, despite Deputy Gray’s testimony to the contrary, that his purpose in approaching Mr. Messer’s vehicle was simply to check to see whether it was “broke down,” under Washington case law his approaching the vehicle does not qualify as an exercise of the community caretaking function.

Building on *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), in *State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2003), the Washington Supreme Court articulated clearly the test for determining whether a law enforcement officer's actions qualify as an exercise of the community caretaking function.

The community caretaking function, which is divorced from the criminal investigation, is one such exception to the warrant requirement. *Id.* at 385. This exception allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety. *Id.* at 386. Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched. *Id.* at 386-87. "Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997).

*Id.* at 802-803.

The first requirement under the test above rests on evidence as to the law enforcement officer's belief that "someone likely needed assistance for health or safety concerns." At no time during Deputy Gray's testimony at the CrR 3.6 hearing did either counsel for the State or counsel for Mr. Messer inquire as to whether prior to approaching the vehicle, or at any time after doing so, the deputy "subjectively believed"

that the occupants of the vehicle “likely needed assistance for health or safety concerns.” Further, Deputy Gray volunteered no such testimony.

These circumstances stand in marked contrast to those in, for example, *State v. Gocken*, 71 Wn. App. 267, 857 P.2d 1074 (1993). In that case the conduct of a police officer satisfied the first element in the test articulated in *Kinzy* and *Thompson*. Specifically, a friend of a 72 year old woman contacted police because she had been unable to contact the 72-year-old and expressed a concern for her well being. A police officer responded by going to the 72-year-old’s condominium and announcing himself outside the front door. Hearing no response, the officer entered the condominium through an unlocked window. Once inside he observed nothing out of the ordinary and, as a result, left. A subsequent search of the condominium, by another officer, prompted by relatives’ concerns about the whereabouts of the 72 year old woman, resulted in the discovery of her decomposing body in the condominium. Ultimately, Mr. Gocken was charged with her murder. *Id.* at 269-272.

Mr. Gocken moved to suppress the evidence gathered by police in the course of the second search. In ruling on Mr. Gocken’s motion to suppress the trial court determined, among other things, that the second officer’s initial entry into the condominium was for a legitimate “health and safety check.” In upholding that determination, the Court of Appeals

reasoned

Officer Shively testified that he entered the condominium to determine if Compton was injured or ill. Although he was not certain “what [he] had”, Berthon's concerns convinced him that Compton might have been inside in need of help. Hence, Officer Shively was motivated to enter Compton's home “by a perceived need to render aid or assistance” (see *Loewen*, 97 Wn.2d at 568), and the subjective prong of the [*Kinzy/Thompson*] test is satisfied as to that initial entry.

*Id.* at 277.

Again, Deputy Gray did not testify that he was motivated to approach Mr. Messer's vehicle by a “perceived need to render aid or assistance.” Consequently, neither did the State satisfy the subjective prong of the test for determining whether Deputy Gray was engaged in community caretaking when he approached Mr. Messer's vehicle; nor did the trial court require it to do so before concluding that “Deputy Gray had good cause to approach the vehicle to perform his community caretaking function.” CP 7: 3-4. Further, the trial court did not enter a finding that Deputy Gray had a good faith belief that either Mr. Messer or the passenger was in need of aid or assistance.

2. Deputy Gray's conduct did not satisfy the requirements for a legitimate *Terry* stop.

In its Findings of Fact and Conclusions of Law the trial court concluded that “Deputy Gray had lawful reasons to approach [Mr.

Messer's] vehicle. First, Deputy Gray had reason to suspect the vehicle due to past theft complaints at the KMAS radio." CP 7: 1-2. That conclusion derives from a single finding:

On the night of February 6, 2012 Deputy Gray noticed a vehicle parked off the road on private property in front of the gate of the KMAS radio tower. Deputy Gray was concerned due to past complaints of theft at the KMAS radio tower.

CP 5: 22-25.

The finding above is consistent with Deputy Gray's testimony that he "contacted" Mr. Messenger and the female passenger in Mr. Messer's vehicle because he had probable cause to believe that they were engaged in or about to be engaged in the crime of theft from the KMAS tower. Of course, once Deputy Gray discovered that Mr. Messer and the passenger were "sleeping hard," it must have been clear to him that neither of the occupants of Mr. Messer's vehicle was engaged in theft or about to be so engaged. As a result, any suspicion as to actual or potential criminal activity involving theft evaporated at that point.

Even if Deputy Gray had a lawful basis for waking Mr. Messer by knocking on the driver's side window of the vehicle and commanding, in a raised voice, Mr. Messer to roll down the window, Deputy Gray's subsequent pat down of Mr. Messer for weapons was unlawful.

Again, as explained above, at no time during his encounter with Mr. Messer did Deputy Gray's conduct qualify as performing the community caretaking function. Thus, once it became apparent to Deputy Gray that neither Mr. Messer nor his passenger was engaged or about to be engaged in theft from the KMAS tower, Washington case law teaches that there had to be some other justification for Deputy Gray's continued contact with Mr. Messer. Implicit in the trial court's Findings of Fact and Conclusions of Law is the conclusion that after Deputy Gray realized neither Mr. Messenger nor his passenger was engaged in or about to engage in theft from the KMAS radio tower, Deputy Gray had a lawful basis for performing an investigative stop of Mr. Messenger. In *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007), the Washington Supreme Court explained:

Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. This exception to the warrant requirement is often referred to as a "*Terry* stop."

Thus, if an officer does not reasonably suspect that a person is, or is about to be, engaged in criminal conduct, the officer may not detain that person for the purpose of conducting a brief investigation into suspected criminal activity. At some point during the February 6, 2012 encounter that is at the heart of this appeal, that encounter became a *Terry*

stop. *Adams v. Williams*, 407 U. S. 143, 92 S. Ct. 1921, 32 L. Ed.2d 612 (1972), teaches that Deputy Gray's encounter with Mr. Messer became a *Terry* stop when Deputy Gray knocked on the window, woke Mr. Messer and instructed him, in a raised voice, to roll down the window.

In *Adams* early one morning a police officer was seated in his parked patrol vehicle in a high crime area. An informant, known to the officer, approached the patrol vehicle and provided the officer with a tip. According to the informant, a person seated in a nearby vehicle was carrying drugs and "had a gun at his waist." Acting on that information, the officer then approached the vehicle to which the informant referred, "tapped on the car window and asked the occupant, Robert Williams, to open the door." Mr. Williams, instead, rolled down the window, at which point the officer observed a revolver in the waistband of Mr. Williams' pants, reached into the vehicle, and "removed the fully loaded revolver." An arrest and search of Mr. Williams' vehicle incident to the arrest followed. *Adams v. Williams*, 407 U. S. at 144 – 145.

In discussing the sequence of events set forth above the U. S. Supreme Court explained why the officer's actions prior to removing the revolver from Mr. Williams' waistband qualified as a legitimate *Terry* stop:

In *Terry* this Court recognized that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” *Id.*, at 22. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. See *id.*, at 23. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. *Id.*, at 21-22; see *Gaines v. Craven*, 448 F.2d 1236 (CA9 1971); *United States v. Unverzagt*, 424 F.2d 396 (CA8 1970). The Court recognized in *Terry* that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect. “When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,” he may conduct a limited protective search for concealed weapons. 392 U.S., at 24. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law. So long as the officer is entitled to make a forcible stop, <sup>1</sup> and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose. *Id.*, at 30.

Applying these principles to the present case, we believe that Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an

anonymous telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect. [2] Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, see, e. g., *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964), the information carried enough indicia of reliability to justify the officer's forcible stop of Williams.

*Id.* at 145 – 146.

Unlike what obtained in *Adams*, at the moment Deputy Gray knocked on the car window, there was no reasonable basis for suspecting that Mr. Messer and/or the other occupant of the vehicle might have been engaged, or about to be engaged in theft from the KMAS tower: both occupants were, by Deputy Gray's own testimony, sound asleep. Even if one were to conclude otherwise, there was no legal justification for Deputy Gray's pulling Mr. Messer from the vehicle and conducting a pat down for weapons.

In *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993), the Washington Supreme Court articulated the three-part test for determining whether an officer has legitimate grounds for performing a pat down on a person subjected to a *Terry* stop:

The Fourth Amendment will be satisfied where the following requirements are met: (1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose. *Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972).

Thus, because the initial stop of Mr. Messer, in the form of the knock on the window, the awakening of Mr. Messer, and the directive to him in a raised voice that he roll down the window was not legitimate, for the reasons explained above the subsequent pat down did not satisfy the Fourth Amendment.

Even if the initial stop of Mr. Messer was lawful, the subsequent pat down was not. Deputy Gray testified that he conducted the pat down because he observed a Jim Bowie knife next to Mr. Messer's leg when Mr. Messer opened the door to the vehicle. Mr. Messer testified that there was no such knife in the vehicle. Otherwise, there was no evidence as to the existence of a Jim Bowie knife before the finder of fact at the suppression hearing. In its Findings of Fact and Conclusions of Law the trial court did not make an explicit finding as to the credibility of the two witnesses on the issue. Instead, the trial court listed as a disputed fact:

The Defendant opened the door to his vehicle, whereupon Deputy Gray observed a big knife near the Defendant.

CP 6:10-11.

One could infer, that the disputed fact above reflects a determination by the trial court that Deputy Gray's testimony as to the presence of a Jim Bowie Knife was more credible than Mr. Messer's testimony. Mr. Messer is aware that "[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Caramillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The finding set forth above must, however, be supported by substantial evidence in the record. *State v. Hill*, 123 Wn.2d at 647. "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.' *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)." *State v. Garvin*, 166 Wn.2d at 249.

In *Adams, supra*, there was abundant evidence that, as the officer testified, Mr. Williams had a fully loaded revolver on his person: After removing the revolver, the officer arrested Mr. Williams for unlawful possession of a firearm. *Adams v. Williams*, 407 U. S. at 144. Subsequently, Mr. Williams was convicted of that crime. Although the majority opinion in the case does not discuss the matter, in order to carry its burden as to the lawfulness of the pat down of Mr. Williams, surely the State had to have introduced evidence of the revolver beyond the officer's statement that he observed and removed it from Mr. Williams.

*Adams* was not a case in which an officer testified that he saw what he thought was a firearm, or that he saw Mr. Williams reach for something on the floor next to or behind him, or that Mr. Williams was making furtive movements. All such alleged acts are similar in that in the absence of a camera recording the officer's alleged observations, the trier of fact at a suppression hearing would have, at most, only the testimony of the officer and Mr. Williams as to what formed the basis for the officer's decision to conduct a pat down. Consequently, the trier of fact would necessarily have to base any findings on the matter on a credibility determination.

Assuming that Deputy Gray had a lawful basis for knocking on the window, waking Mr. Messer, and directing him to roll down the window, whether Deputy Gray had a lawful basis for patting down Mr. Messer requires an assessment of the totality of the circumstances attending the decision to pat down. *State v. Collins*, 121 Wn.2d at 174. Again, Deputy Gray testified at the suppression hearing that he saw a Jim Bowie knife next to Mr. Messer. Unlike an officer who testifies that he thought he saw a weapon, Deputy Gray was unequivocal. In fact, he described the Jim Bowie knife in some detail: it had a five to six inch blade and a bone handle. The declaration that Deputy Gray supplied in support of the State's Motion and Declaration for Order Determining Existence of

Probable Cause and Directing Issuance of Summons of Warrant is consistent with that testimony. CP 13-15. Yet, if there were such a Jim Bowie knife next to Mr. Messer's leg, it is fair to ask, "What became of the knife?" The State made no effort to introduce the alleged knife at the suppression hearing, to have Deputy Gray identify the knife itself or a photo of it, or to ask Deputy Gray about its whereabouts or what he did with it, if anything, after he allegedly observed it next to Mr. Messer. There was no testimony that after Deputy Gray secured the knife it somehow disappeared despite efforts of Deputy Gray or some State custodian to retain possession of it. In short, if the Jim Bowie knife actually existed, there is no reason for the State not to have produced some objective evidence of it at the suppression hearing. Accordingly, Mr. Messer submits that the finding as to Deputy Gray's observation of the "big knife" is not supported by substantial evidence. Consequently, there is no factual support for the conclusion that the pat down was lawful.

3. Because Deputy Gray's pat down of Mr. Messer was unlawful, all evidence seized in connection with and subsequent to the pat down should have been excluded.

The Washington Supreme Court has stated unequivocally that whether pursuant to the Fourth Amendment to the U. S. Constitution or

Article I, Section 7, of the Washington Constitution, all evidence of crime obtained in connection with an unlawful search must be excluded:

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article I, section 7, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110-12, 640 P.2d 1061 (1982); *State v. Boland*, 115 Wn.2d 571, 582-83, 800 P.2d 1112 (1990). We affirm this rule today, noting our constitutionally mandated exclusionary rule "saves article 1, section 7 from becoming a meaningless promise." Sanford E. Pitler, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 508 (1986). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. *State v. Crawley*, 61 Wn. App. 29, 34-35, 808 P.2d 773 (1991).

*State v. Ladson*, 138 Wn.2d 343, 359-360, 979 P.2d 833 (1999).

#### CONCLUSION

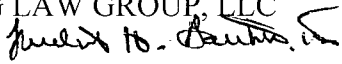
Mr. Messer's conviction for possession with intent to deliver a controlled substance depended on evidence that Deputy Gray seized during the February 6, 2012 encounter with Mr. Messer. As discussed above, there is not substantial evidence in the record to support the trial court's findings that Deputy Gray observed a big knife after Mr. Messer opened the vehicle door and that upon observing the knife, Deputy Gray pulled Mr. Messer from the vehicle and patted him down, i.e., findings 4 and 5. Consequently, there is insufficient factual support in the record to

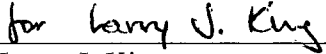
support the trial court's conclusions as to the lawfulness of Deputy Gray's contact with Mr. Messer, particularly the pat down of Mr. Gray, i.e., conclusions 1, 4, and 5. Further, for the reasons discussed above, even the undisputed facts, which Mr. Messer does not challenge as error, do not support the trial court's conclusions that Deputy Gray had lawful reasons to approach Mr. Messer's vehicle, i.e., conclusion 2. Accordingly, the trial court erred in dismissing Mr. Messer's motion to suppress, i.e., conclusion 6.

Because the evidence before the trial court on Mr. Messer's motion to dismiss was insufficient to support the findings and conclusions identified above, Mr. Messer asks the Court to reverse the dismissal of his motion to suppress and to vacate his conviction for unlawful possession with intent to deliver a controlled substance.

Respectfully submitted this 6<sup>th</sup> day of September 2013.

KING LAW GROUP, LLC

by: 

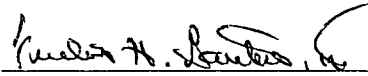
for 

Larry J. King

WSBA No. 1325

Attorney for James Messer

GAUTSCHI LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Frederick H. Gautschi, III", is positioned above a horizontal line.

Frederick H. Gautschi, III

WSBA No. 20489

Attorney for James Messer

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 44848-3

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CERTIFICATE OF SERVICE BY  
MAILING

JAMES MESSER,

Appellant.

I, Frederick H. Gautschi, III, co-counsel for Appellant James Messer in the above-captioned appeal, certify that on September 6, 2013, I placed in the U.S. Mail a copy of a Appellant's Brief and a copy of this Certificate of Service by Mailing to be mailed via the U.S. Postal Service to Timothy Whitehead, counsel for Respondent State of Washington, in the above-captioned appeal, whose mailing address is below:

Timothy Whitehead  
Mason County Prosecutor's Office  
P.O. Box 639  
Shelton, WA 98584-0639

Dated this 6th day of September 2013.

  
\_\_\_\_\_  
Frederick H. Gautschi, III, WSBA No. 20489  
Attorney for James Messer

FILED  
COURT OF APPEALS  
DIVISION II

2013 SEP 11 AM 11:55

STATE OF WASHINGTON

BY                       
DEPUTY

No. 44848-3

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CERTIFICATE OF SERVICE BY  
MAILING


JAMES MESSER,

Appellant.

I, Frederick H. Gautschi, III, co-counsel for Appellant James Messer in the above-captioned appeal, certify that on September 9, 2013, I placed in the U.S. Mail a copy of a Appellant's Brief and a copy of this Certificate of Service by Mailing to be mailed via the U.S. Postal Service to James Messer, Appellant in the above-captioned appeal, whose mailing address is below:

James Messer  
DOC No. 366141  
Larch Corrections Center  
15314 NE Dole Valley Road  
Yacolt, WA 98675-9531

Dated this 9th day of September 2013.



Frederick H. Gautschi, III, WSBA No. 20489  
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